Supreme Court, U.S.
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Supreme Court of the United States

CHARLES L. GRIMES and JANE GILLESPIE GRIMES,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Warsaw Convention, the treaty concerning actions against airlines by international passengers, deals in Article 17 with "accidents," and in Article 25 with airlines' "willful misconduct."

1. In *Air France* v. *Saks*, 470 U.S. 392, 404-406 (1985), this Court defined an "accident" under Article 17 as "an unexpected or unusual event or happening that is external to the passenger," admonishing that "this definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," that it "requires only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger," and that it is "for the trier of fact to determine whether an 'accident' as here defined caused the passenger's injuries."

The "event or happening" giving rise to this suit was the arrest and forcible removal of a passenger sitting quietly in the seat to which he had concededly been assigned. Did the court below violate *Saks* by holding that there was no "accident," based on its own stated view that the broad overall general category of "confusion about seat assignments" and "removal of bumptious [*sic*] passengers" was not "unexpected or unusual," without analyzing the elements of the specific occurrence or referring to the (clearly contrary) evidence of record?

This perception of the *Saks* requirements by the court below is inconsistent with a recent dictum of this Court in *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662, 670 n.9 (1999), and with the Eleventh Circuit's

decision in *Krys* v.*Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

2. Under the applicable version of Article 25, a carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct . . . ." Did the court below err in holding that Article 25 applies only when there is an "accident" under Article 17?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding iii

Table of Contents iv

Authorities Cited vi

Petition for Writ of Certiorari 1

I. Preliminary 1

A. Reports of Opinions and Orders in the Case .. 1

B. Basis for Jurisdiction in This Court 2

C. Treaties Involved in the Case 2

II. Statement of the Case 3

III. Reasons for Allowance of the Writ 7

A. The Case Involves Issues of Substantial General Importance Affecting Millions of International Air Passengers 7

B. The Decision Below Misperceives This Court's Decision and Admonitions in *Air France* v. *Saks*, 470 U.S. 392 (1985), and Is Inconsistent With a Recent Dictum of This Court and With a Decision of the Eleventh Circuit 8

C. The Decision Below Rests on a Principle of Treaty Construction Which This Court Has Condemned 12

Conclusion 15

Page

Appendix

A. Opinion Below 1a

B. Judgment Below 6a

C. Opinion and Order of the District Court on Summary Judgment 8a

D. Opinion and Order of the District Court on Motion *in Limine* 16a

E. Order of District Court Adopting Magistrate Judge's Report and Recommendation 19a

F. Report and Recommendation of Magistrate Judge on Punitive Damages 20a

G. The Warsaw Convention 25a

H. Excerpt From Montreal Protocol No. 4 ..... 42a

AUTHORITIES CITED

Page(s)

CASES:

Air France v. *Saks*, 470 U.S. 392 ..... *passim*

Chan v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) 14

Eastern Airlines, Inc. v. *Floyd*, 499 U.S. 530 (1991) 3

El Al Israel Airlines, Ltd. v. *Tseng*, 119 S. Ct. 662 (1999) 3, 7, 9-11, 15

Floyd v. *Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) 14

In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir. 1991) 14

Krys v. *Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998) ... 11

Langadinos v. *American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000) 11

Oliver v. *Scandinavian Airlines System*, 17 CCH AV. CAS. 18,283 (Md. 1983) 11

Wallace v. *Korean Air*, 2000 WL 730385 (2d Cir. June 6, 2000) 9, 12, 15

Zicherman v. *Korean Air Lines Co.*, 516 U.S. 217 (1996) 3

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 3

28 U.S.C. § 1331 3

Authorities Cited continued

Page(s)

TREATIES:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929 ("the Warsaw Convention"), 49 STAT. 3000, T.S. No. 876 (1934), note following 49 U.S.C. App. § 1502 ..... *passim*

Montreal Protocol No. 4 To Amend the Convention for the Unification of Certain Rules Relating to International carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague of 28 September 1955, Signed at Montreal on 25 September 1975 (effective in the United States from March 4, 1999) 3 n.1

ARTICLES:

Whalen, Thomas J., *Update on the IATA Intercarrier Agreement*, 13-Fall AIR & SPACE LAW. 1 (1998) ..... 13 n..5

OTHER MATERIALS:

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, approved by Order E-23680, May 13, 1966, 31 FED. REG. 7302 (1966), note following 49 U.S.C. App. § 1502 ..... 13 n.5

CHART #1 FORECAST OF INTERNATIONAL TRAVEL TO THE UNITED STATES (ESTIMATES IN THOUSANDS), www.tinet.ita.doc.gov 7

Authorities Cited continued

Page(s)

U.S. INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS CALENDAR YEAR 1994, www.bts.gov/oai/international/calyr94.htm 7

IN THE

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PETTITION FOR WRIT OF CERTIORARI

Charles L. Grimes ("Grimes") and Jane Gillespie Grimes ("Jane Grimes") (collectively "the Grimeses") respectfully petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

I. Preliminary

A. Reports of Opinions and Orders in the Case

The opinion of the court below is unreported. It is reproduced in the Appendix at 1a-7a. Opinions of the court of first instance, the United States District Court for the Eastern District of Pennsylvania, are reported at 1999 WL 562244 (E.D.Pa.) (reproduced at 8a-15a) and 1999 WL 527831 (E.D.Pa.) (reproduced at 16a-18a).

B. Basis for Jurisdiction in This Court

The judgment of the court below was entered on May 4, 2000. 6a-7a. This Court has jurisdiction to review the judgment in question on a writ of certiorari under 28 U.S.C § 1254(1).

C. Treaties Involved in the Case

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929 ("the Warsaw Convention"), 49 STAT. 3000, T.S. No. 876 (1934), note following 49 U.S.C. App. § 1502:

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

The full text of the Convention will be found in the Appendix at 25a-41a.[1]

II. Statement of the Case

1. The court of first instance was the United States District Court for the Eastern District of Pennsylvania. That court had jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and/or 28 U.S.C. § 1331 (actions arising under treaties of the United States).

2. Over the past 15 years this Court has decided a series of cases that clarify application of the Warsaw Convention, including *Air France* v. *Saks*, 470 U.S. 392 (1985) (definition of "accident" under Article 17); *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530 (1991) (no recovery under Article 17 solely for mental or psychic injuries absent bodily injury); *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217 (1996) (cognizability of harm under Article 17 is determined by domestic law); and *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662 (1999) (ousting of state law remedies by Article 17). This case presents issues that were discussed last year in *El Al* but could not there be decided because of stipulations by the parties, *viz.*, application of the *Saks* definition of "accident," and the relationship between Article 17 and Article 25.

3. On August 13, 1998, the Grimeses were passengers on an international flight of the respondent Northwest

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[1] The quoted text of Article 25 was in effect as of the date of the occurrence giving rise to this suit, August 13, 1998. Article 25 was subsequently amended by Montreal Protocol No. 4, effective in the United States from March 4, 1999. Its text appears at 42a.

Airlines from Detroit to Philadelphia.[2] Well in advance of the flight, Grimes, who was 63 years old, advised Northwest that he had a physical need for maximum legroom and requested a seat on an exit row. Such a seat reservation was duly issued to him and was reconfirmed. He arrived early for the flight departure, and Northwest personnel checked and verified his seat assignment and duly seated him.

Another passenger then arrived, saying that she had been issued a reservation for the same seat. She did not press the issue, however, and quietly took another seat, one of many empty seats on the plane. However, a truculent and belligerent employee of Northwest, one Leone, nevertheless demanded that Grimes get off the plane. He declined to do so. Leone became enraged, snatched Grimes's boarding pass, and made other offensive moves, including physical contact. When Grimes still declined to leave the airplane, the airport police, at the instigation and direction of Leone and the captain of the aircraft (whose information about the matter was limited solely to whatever Leone told him), arrested Grimes and removed him from the plane.

Though they had been advised of his physical problems, the police yanked at Grimes's arms while he was still belted in his seat, injuring him in front of Leone, other passengers, and his wife. They jerked him out of his seat in handcuffs, slammed him against the gangway wall, twisted his arm up behind his back, tried to throw him on the floor, and threatened him with pepper spray.

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[2] The flight was from Vancouver, B.C., to Philadelphia, with an overnight layover and change of planes in Detroit; the incidents in question took place in the Detroit airport in the boarding process for the Detroit-Philadelphia leg. This qualifies as an international flight under the Warsaw Convention.

He sustained bruises and nerve damage to both wrists, a badly sprained right ankle, and injuries to his left ankle, neck, right shoulder, and right arm; and was unable to travel on his regular business for an extended period.

4. The Grimeses brought suit against Northwest in the United States District Court for the Eastern District of Pennsylvania, setting forth claims for personal injuries resulting from, *inter alia*, false imprisonment, assault, defamation, and intentional infliction of emotional distress. Compensatory and punitive damages were claimed. Trial by jury was demanded.

5. On deposition, the captain of the plane and two flight attendants testified that removal of a passenger was a rare occurrence. The captain, a veteran pilot, testified that he had had occasion to order removal of a person from an aircraft only seven times in his 28 years' experience. APP0800, APP0864.[3] Neither flight attendant, with eight and six years' experience respectively, had ever witnessed the removal of a passenger from an airplane. APP1193-4, APP1291.

On deposition, the arresting detective sergeant testified that Grimes's demeanor was "matter of fact" rather than bumptious. "[N]othing overly aggressively loud. Just a matter of fact, nope, I'm not going." APP0347, APP0388.

6. The district court dismissed the claim for punitive damages, holding that the action was one under the Warsaw Convention and that punitive damages are not awarded in such actions. 19a-24a. It granted a motion *in limine* precluding, as speculative, any offer of evidence as to Grimes's financial losses resulting from his inability

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[3] "APP" citations are to the Joint Appendix in the court below.

to travel by reason of his injuries. 16a-18a. Finally, it granted a motion for summary judgment in Northwest's favor. 8a-15a.

In granting summary judgment, the district court held, first, that the Grimeses could sue only under the Warsaw Convention and not under state law. It held, second, that only Article 17 of the Convention was implicated and not Article 25, on the ground that there was no evidence that Northwest's employees had committed willful misconduct (thus disregarding whether the jury could have inferred such an intent from the evidence). Third, it dismissed Jane Grimes's claim for emotional injuries on the ground that compensation for such injuries cannot be recovered under Article 17. Fourth, it held that Grimes's injuries were not caused by an "accident" under the Warsaw Convention. Evidently considering that the injuries were caused by "an argument over seating" rather than by the belligerent behavior of the airline personnel and the police, it held that "an argument over seating is neither unexpected nor unusual," and that the injuries Grimes suffered were his own fault because "it was entirely within Grimes's control whether he was arrested." 12a-15a.

7. On appeal, the Third Circuit did not address or follow this last reasoning. Instead, it simply said that the injuries complained of "did not come about as the result of an 'accident,' as that term is used in the Warsaw Convention," because "confusion about seat assignments is hardly unexpected or unusual. Nor is the removal of bumptious passengers from planes." Hence, there was no liability under Article 17. 4a. As for Article 25, it held that "[o]nly after one has established that an accident occurred can one attempt to demonstrate that the accident came about as a result of willful misconduct, in

which case one can benefit from the provisions of Article 25." 4a n.3. It accordingly did not address Article 25 further, simply saying generally that "[a]s Mr. and Mrs. Grimes are barred from recovering at all under the Warsaw Convention, we do not need to reach the question of whether the District Court was correct to bar Mr. and Mrs. Grimes from seeking emotional damages and consequential damages under their claims." 5a.

III. Reasons for Allowance of the Writ

A. The Case Involves Issues of Substantial General Importance Affecting Millions of International Air Passengers.

With exceptions under Article 25 discussed *infra*, the Warsaw Convention preempts state law actions by international passengers against air carriers, so that all such actions must be brought under the Convention, *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662 (1999); and the Convention generally provides for less redress to passengers than would actions under state law. Huge numbers of people are affected. In 1994, the most recent year for which the Department of Transportation has published figures, nearly 97 million passengers traveled by air between the United States and the rest of the world. U.S. INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS CALENDAR YEAR 1994, www.bts.gov/oai/international/calyr94.htm. The Commerce Department forecasts nearly 26 million visitors to the United States from overseas for 2000 and over 30 million for 2003, CHART #1 FORECAST OF INTERNATIONAL TRAVEL TO THE UNITED STATES (ESTIMATES IN THOUSANDS), www.tinet.ita.doc.gov, almost all of whom will travel by air. And in the jet era, not only traditional ports of entry like New York and San

Francisco, but inland cities like Atlanta and Denver, have become international gateways; moreover, under the expansive definition of an "international" flight under the Convention, a through ticket to any point in the United States that originates or passes through a foreign country is subject to the Convention, even if the relevant leg of the journey is a wholly domestic flight.

Also implicated is fairness as between international and domestic passengers. Again because of the expansive definition of an "international" flight under the Convention, oftentimes one passenger will be caught by the restrictions of the Convention when another passenger on the same plane is not. The Detroit-to-Philadelphia flight in this very case was a domestic flight in every real sense. Yet because they happened to be traveling on a through ticket originating in Canada, the Grimeses came under the Convention — while a passenger in the adjacent seat subjected to the same treatment could have had full redress under state law.

National — indeed, international — uniformity and clarity in the handling of claims under the Convention, both for "accidents" under Article 17 and for "willful misconduct" under Article 25, is thus a matter of major public importance.

B. The Decision Below Misperceives This Court's Decision and Admonitions in *Air France* v. *Saks*, 470 U.S. 392 (1985), and Is Inconsistent With a Recent Dictum of This Court and With a Decision of the Eleventh Circuit.

In *Air France* v. *Saks*, 470 U.S. 392, 405 (1985), this Court defined an "accident" under Article 17 as "an unexpected or unusual event or happening that is external to the passenger." Of cardinal importance was

what the Court said about the application of its definition. "This definition," it said, "should be *flexibly applied* after assessment of *all the circumstances* surrounding a passenger's injuries." 470 U.S. at 404-405 (emphasis added). "[W]e require only that the passenger be able to prove that *some link in the chain* was an unusual or unexpected event external to the passenger." 470 U.S. at 406 (emphasis added). And "[i]n cases where there is contradictory evidence, it is for the *trier of fact to determine* whether an 'accident' as here defined caused the passenger's injuries." 470 U.S. at 405 (emphasis added).

The Second Circuit noted very recently that "courts have wrestled with the *Saks* definition of 'accident' since it was announced." *Wallace* v. *Korean Air*, 2000 WL 730385 at *5 (2d Cir. June 6, 2000). This case affords an opportunity to clarify matters.

Such an opportunity seemed to be afforded last year in *El Al*, *supra*, but was frustrated by stipulations of the parties when the case reached this Court. That was an action by a passenger who claimed to have been subjected to an improper physical search. Directly relevant to the present case was the question, considered by both the district court and the Second Circuit, whether the search of the passenger was an "accident." The district court had held that it was, expressly "[u]sing the flexible application prescribed by the Supreme Court" in *Saks*, 119 S. Ct. at 670 n.9, and concluding: "[A] routine search applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately characterized as an accident." *Ibid.* But the Second Circuit disagreed. Rather than "assess[ing] all the circumstances surrounding [the] passenger's injuries," as instructed by *Saks*, and analyzing the event

by its constituent elements, it addressed only the event's overall category — and at a high level of abstraction. Security searches, it said, are "routine." "The risk of mistakes, *i.e.*, that innocent persons will be erroneously searched," is "[i]nherent in any effort to detect malefactors." Therefore, it reasoned, what the passenger had been subjected to was not "an unexpected or unusual event" but "ordinary events and procedures of air travel." *Ibid.*

This Court clearly regarded the Second Circuit's approach as faulty. "It is questionable," said Justice Ginsburg for the Court, "whether the Court of Appeals 'flexibly applied' the definition of 'accident' we set forth in *Saks*." *Ibid.* But the opportunity to clarify the application of *Saks* was forestalled in *El Al* by the fact that the plaintiff chose to stipulate in this Court that the matter in suit had not been an "accident" within the meaning of Article 17. 119 S. Ct. at 667, 670 n.9.[4]

That opportunity is presented now. The court below performed essentially the same high-level abstraction as did the Second Circuit in *El Al*. Rather than "assess[ing] all the circumstances surrounding a passenger's injuries," as directed by *Saks*, and "flexibly" analyzing the event sued on in that light to ascertain whether "some link in the chain was an unusual or unexpected event external to the passenger," it simply declared (evidently as a matter of judicial notice, and in direct contradiction to the evidence) that the general categories "confusion over seat assignments" and "removal of bumptious [*sic*]

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[4] This left as the issue before this Court the question whether "a passenger whose injury is not compensable under the Convention (because it entails no 'bodily injury' or was not the result of an 'accident')" has any recourse to an alternate remedy; the Court answered in the negative. 119 S. Ct. at 668.

passengers" was "hardly unexpected or unusual," without even addressing testimony as to the demeanor of the passenger, the behavior of Leone, the brutality of the police, or any connection between the two; just as the Second Circuit in *El Al* simply declared the general category of "security searches" to be "routine," and shrugged off the wrongful behavior of the airline in the specific case of its security search of the plaintiff there, on the ground that "mistakes" will happen.

As the Court implicitly recognized in *El Al*, this approach makes a mockery of the guidelines so carefully laid down in *Saks*. Almost any event can be subsumed under some general "routine" category at a high level of abstraction and shrugged off with "mistakes will happen." As but one example, it is "routine" to serve alcoholic beverages in flight, and mistakes may happen and somebody be served too much; but injury caused by such a drunken passenger is caused by an "accident" for Article 17 purposes. *Langadinos* v. *American Airlines, Inc.*, 199 F.3d 68 (1st Cir. 2000); *Oliver* v. *Scandinavian Airlines System*, 17 CCH AV. CAS. 18,283 (Md. 1983), cited with approval in *Saks*, 470 U.S. at 405.

At least two other courts of appeal have taken a view more in harmony with *Saks*. The Eleventh Circuit, in *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), was explicit that the proper approach is not to look at some high-level overarching generalization such as, in that case, "crew negligence," but rather to analyze the "purely factual description of the events" giving rise to the action, "asking what precise event or events allegedly caused the damage sustained by the plaintiff." *Id.* at 1521-22 and n.10. Here, the "precise event" was not

some vague "dispute over seat assignments," but the brutal ejection of plaintiff not only from the seat which he had been assigned and to which he had been directed, but from the airplane itself. In a very recent case, the Second Circuit — having evidently taken to heart this Court's observations as to its treatment of the "accident" issue in *El Al* — similarly engaged in a detailed analysis of the facts in determining that the sexual groping of a female passenger by a male passenger, without interference by the airline crew, was an Article 17 "accident." *Wallace* v. *Korean Air*, 2000 WL 730385 at *6-*7 (June 6, 2000).

Finally, over and above these broadly applicable considerations, in this case the court below failed to observe the *Saks* admonition that "[i]n cases where there is contradictory evidence, it is for the trier of fact to determine whether an 'accident' as here defined caused the passenger's injuries." 470 U.S. at 405. It is impossible to square with this admonition the *ipse dixit* of the court below that the cause of petitioners' injuries was "hardly unexpected or unusual," when the testimony of two experienced flight attendants and the veteran captain of the aircraft was directly to the contrary. It is impossible to square with this admonition the reference by the court below to "bumptious passengers," when the very arresting detective sergeant himself testified that Grimes's demeanor was "matter of fact."

C. The Decision Below Rests on a Principle of Treaty Construction Which This Court Has Condemned.

Likewise of broad general importance is the interrelationship between determination of an "accident" under Article 17 and "willful misconduct" under Article

25. The court below, as noted, held that Article 25, in its form applicable to the present case, "merely removes the limits on recovery created by other provisions of the Convention" — *i.e.*, the cap on quantum of damages in Article 22[5] — so that "[o]nly after one establishes that an accident occurred can one attempt to demonstrate that the accident came about as a result of willful misconduct, in which case one can benefit from the provisions of Article 25." 4a n.3.

The implications of this interpretation are grotesque. Under it, for example, an airline that willfully inflicted bodily injury on its passengers as a matter of routine would escape liability, because there would be no "accident" since the behavior was not "unexpected or unusual." An airline could willfully defame passengers or otherwise inflict mental or emotional injury on them with impunity, because there is no liability for such injury in the case of "accidents" under Article 17.

But that is not what the applicable version of Article 25 *says*. It says that in cases of willful misconduct, "[t]he carrier shall not be entitled to avail himself of the provisions of this convention which [a] exclude ***or*** [b]

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[5] Article 22 sets an upper limit on the quantum of a carrier's liability. In the Convention itself, this limit is 125,000 gold francs. Carriers have voluntarily waived this limit in part or in whole and subject to certain conditions, by the so-called "Montreal Agreement" (not to be confused with "Montreal Protocol No. 4"), Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, approved by Order E-23680, May 13, 1966, 31 FED. REG. 7302 (1966), note following 49 U.S.C.App. § 1502; 14 C.F.R. § 203.4, and the IATA Intercarrier Agreement on Passenger Liability (1995), to be implemented pursuant to the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement (1996). *See* Thomas J. Whalen, *Update on the IATA Intercarrier Agreement*, 13-Fall AIR & SPACE LAW. 1 (1998).

limit his liability." (Emphasis and "[a]" and "[b]" added.) The court below read this as if the words "exclude or" did not appear. But the language is absolutely plain. If there is no "accident" or bodily injury, under *Saks* and *El Al* the Convention *excludes* liability. But under Article 25, the carrier cannot take advantage of this exclusion in the event of willful misconduct; the exclusion ceases to apply and the carrier's liability is governed by state law. If there is an "accident," Article 22 sets a quantum *limit* on liability. But under Article 25, the carrier cannot take advantage of this limit in the event of willful misconduct; Article 22 ceases to apply and the carrier's liability is unlimited. That is the indisputable plain meaning of these words. There is no ambiguity whatever in them.

The court below made no independent analysis and simply relied on two older cases for the proposition that Article 25 does not mean what it says. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991); *Floyd* v. *Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991). Both these cases relied on negotiating materials and drafting history. 932 F.2d at 1484-90; 872 F.2d at 1483-89. Whatever may be the principles of treaty construction where there is ambiguity (such as in determining the meaning of "accident" or "willful misconduct," or of some technical French law term in the original French of the Convention), there is no room for resort to such materials to gloss unambiguous language. *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("We must thus be governed by the text — solemnly adopted by the governments of many separate nations — whatever conclusions might be drawn from the intricate drafting history . . . .").

Like the Article 17 issue, this Article 25 issue was present in *El Al* but this Court did not rule on it because the passenger failed to preserve it. *119 S. Ct. at 670 and* n.10. Justice Stevens made it vigorously clear in his dissent in *El Al* that under Article 25, "[t]he Convention . . . does not preempt local law in cases arising out of 'willful misconduct,'" 119 S. Ct. at 676, and that "accident cases . . . preempt local law, [while] willful cases . . . do not." *Id.* at 677. (His dissent was not as to this point but as to preemption of local law in the "narrow sliver of incidents that arise neither from an accident nor willful misconduct." *Id.* at 676 (footnote omitted).

Like the question of defining an "accident," the question of the relationship between Article 17 and Article 25 is a matter of great public importance affecting millions of travelers nationwide. (Its significance is not diminished by the fact that for cases arising since March 4, 1999, Montreal Protocol No. 4 has amended Article 25 to deal expressly only with the cap on damages.)

CONCLUSION

In view of the public importance of the issues, calling for uniformity of treatment of millions of travelers, and fairness as between domestic and international passengers; the court below's misperception of this Court's *Saks* decision; the lower courts' "wrestl[ing] with the *Saks* definition of 'accident' since it was announced," *Wallace*, *supra*; and the conflict among circuits, the petition for certiorari should be granted.

Respectfully submitted,

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August 1, 2000

APPENDIX A

UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1689

CHARLES L. GRIMES:
JANE GILLESPIE GRIMES, h/w

Appellants

v.

NORTHWEST AIRLINES, INC.

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 98-cv-04794
District Court Judge: The Honorable James McGirr Kelly

Submitted Under Third Circuit LAR 34.1(a)
Tuesday, April 11, 2000

Before: NYGAARD, ALITO, and GIBSON, *Circuit Judges.*[*]

(Opinion Filed: May 4, 2000)

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[*] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

MEMORANDUM OPINION OF THE COURT

ALITO, Circuit Judge:

Charles Grimes ("Grimes") and his wife, Jane Grimes ("Mrs. Grimes") appeal from an order of the District Court granting summary judgment to Northwest Airlines on all their claims against Northwest. For the reasons given below, we affirm the order of the District Court.

I.

Grimes and his wife bought tickets to fly Northwest Airlines from Vancouver to Philadelphia on August 13, 1998. The flight involved a stop and change of planes at Northwest's Detroit hub. On the day of departure, Grimes took great pains to ensure that he was assigned a seat in the exit row for both the flight from Vancouver to Detroit and the flight from Detroit to Philadelphia. In Detroit, the Grimeses switched planes and boarded the plane to Philadelphia. Grimes took his assigned seat in the exit row.

While Grimes was sitting in the exit row, a woman arrived holding a boarding pass for Grimes's seat. Grimes refused to move for her. The woman returned to the gate and asked for help. The flight attendant then boarded the plane and examined Grimes's boarding pass. The gate attendant concluded that Northwest had switched planes for this flight and had switched seat assignments, and that in the confusion it had assigned Ms. Combs the same seat that it had already assigned to Grimes. The attendant told Grimes to leave his seat and discuss the seating arrangements outside the plane. Grimes said that he would not leave the seat since he had waited many hours at the airport to ensure that he got the seat. *See* App. at 960. An argument ensued. The gate attendant called the

police and insisted that Grimes discuss the issue in the jetway. Grimes refused and demanded to see the captain. The police and the captain eventually arrived. After the gate attendant explained the situation, the captain asked the police to remove Grimes. Grimes was handcuffed and removed from the plane, which departed without him.

Grimes and his wife then instituted the present suit, alleging (1) false arrest and imprisonment, (2) assault and battery, (3) intentional infliction of emotional distress, (4) defamation, (5) negligence, and (6) breach of contract. Before trial, the District Court dismissed all claims for emotional damages on the pleadings. The Court also issued an order *in limine* which barred Mr. and Mrs. Grimes from introducing any evidence at trial that missing the plane had caused him to make bad investment decisions. Shortly before the case was scheduled to go to trial, the District Court granted summary judgment to Northwest on all claims. Mr. and Mrs. Grimes now appeal.

II.

Federal subject matter jurisdiction in this case is based on 28 U.S.C. § 1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. After careful review of the briefs and the opinion of the District Court, we conclude that it was appropriate to grant summary judgment to Northwest on all of the plaintiffs' claims.

Neither party disputes that Mr. Grimes was injured as a result of a dispute occurring during the course of an "international flight." Accordingly, the plaintiffs' claims are governed by the treaty popularly known as the Warsaw Convention (the "Convention").[2] One can recover under

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929,49 Stat. 3000 (1934), codified as amended at 49 U.S.C.A. § 40105.

the Convention only if one is injured in an "accident" as defined in Article 17.[3] For the purposes of Article 17, a passenger is injured in an accident if his or her "injury is caused by an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985). After reviewing the briefs and the record, we agree with the District Court that no reasonable juror could conclude that Mr. Grimes suffered an "accident" under Article 17.

First, the fact that Grimes was asked to discuss his seating outside the plane may have seemed unreasonable, but confusion about seat assignments is hardly unexpected or unusual. Nor is the removal of bumptious passengers from planes. Thus, when Grimes refused to comply with requests to leave his seat, he could not have been surprised to find himself removed forcibly from the plane. Grimes's frustration is understandable and we are in no position to tell whether the conduct of Northwest's employees unduly exacerbated the situation. But it is

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[3] The plaintiffs argue that Article 25 permits suits to proceed even if there is no "accident" under Article 17. We disagree. Article 25 does not create an independent cause of action. It merely removes the limits on recovery created by other provisions of the Convention. Accordingly to recover under the Convention one must always establish the elements of a cause of action under Article 17. *See In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475,1488-89 (D.C. Cir. 1991) (holding Article 17 is not interpreted as one of the provisions that "exclude or limit" liability for which Article 25 applies); *Floyd v. Eastern Airlines*, 872 F .2d 1462, 1483-85 (11th Cir. 1989) (holding wilful misconduct only removes liability cap in Article 22 of the Warsaw Convention and does not make the Warsaw Convention inapplicable as a whole), *rev'd on other grounds*, 499 U.S. 530 (1991). Only after one establishes that an accident occurred can one attempt to demonstrate that the accident came about as a result of wilful misconduct, in which case one can benefit from the provisions of Article 25.

apparent that Grimes's injuries did not come about as a result of an "accident," as that term is used in Article 17 of the Warsaw Convention, and therefore he cannot recover any damages from Northwest.

We are also persuaded by the District Court's conclusion that Mrs. Grimes may not recover for her alleged injuries, both because she was not injured in an accident and because the Warsaw Convention does not, in any case, permit recovery for non-physical harms. As Mr. and Mrs. Grimes are barred from recovering at all under the Warsaw Convention, we do not need to reach the question of whether the District Court was correct to bar Mr. and Mrs. Grimes from seeking emotional damages and consequential damages under their claims.

Finally, we note in passing that Grimes's complaint in the District Court alleged breach of contract. None of the District Court's opinions or orders specifically make reference to this claim, and the plaintiffs' opening brief to this court does not argue that this claim should be reinstated. The Grimes have therefore waived their appeal on the breach of contract claim, *see, e.g., Federal Deposit Ins. Corp. v. Deglau*, 207 F.3d 153, 169 (3d Cir., March 13, 2000); *Brenner v. Local 514, United Brotherhood of Carpenters*, 927 F .2d 1283, 1298 (3d Cir. 1991), and we will not consider this issue.

Accordingly, the judgment of the District Court is affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Samuel A. Alito
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1689

CHARLES L. GRIMES:
JANE GILLESPIE GRIMES, h/w

Appellants

v.

NORTHWEST AIRLINES, INC.

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 98-cv-04794
District Court Judge: The Honorable James McGirr Kelly

Submitted Under Third Circuit LAR 34.1(a)
Tuesday, April 11, 2000

Before: NYGAARD, ALITO, and GIBSON, *Circuit Judges.*[*]

JUDGMENT

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[*] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

This cause came to be heard on the record from the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on April 11, 2000.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court be and is hereby AFFIRMED.

Costs are taxed against appellant.

Attest:

/s/ Maureen M. Waldron
Acting Clerk

DATED: May 4, 2000

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. CIV. A. 98-CV-4794

CHARLES L. GRIMES:
JANE GILLESPIE GRIMES,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

July 30, 1999

MEMORANDUM AND ORDER

JAMES McGIRR KELLY, JUDGE

Presently before the Court is Defendant Northwest Airlines, Incorporated's ("Northwest") Motion for Summary Judgment. Defendant believes summary judgment is appropriate because its liability is defined by the Warsaw Convention, which Defendant argues bars any recovery by Plaintiffs. The Court finds Defendant's position persuasive and, for the reasons that follow, will grant Defendant's motion.

I. FACTUAL BACKGROUND

Plaintiffs Charles and Jane Grimes, having arrived in Detroit from Vancouver, boarded a Northwest Airlines flight destined for Philadelphia. Mr. Grimes had

requested an exit row seat, and took a seat he believed was assigned to him. Another passenger, Wendy Combs, also held a boarding pass for the same seat and, finding Mr. Grimes in her seat, sought the assistance of a Northwest employee. This employee, Mark Leone, inspected her pass and Mr. Grimes'. Combs apparently tired of this dispute and found another seat.

Neither Grimes nor Leone took this cue and an argument between the two developed. Grimes claims Leone persisted in maintaining Grimes was in the wrong seat and threatened to have Grimes removed from the plane. Grimes also alleges that Leone stepped on his foot and "brushed against Mr. Grimes with his crotch." (Pls.' Mem. Resp. Def.'s Mot. Summ. J. at 4.) This "was deliberate and it hurt Mr. Grimes." *Id.* Leone was not the only aggressor, however; Grimes testified he insulted Leone and refused to leave the seat, announcing airport police would have to arrest him to get him off of the plane. (Grimes Dep. at 62-63, 66.)

The dispute between Grimes and Leone escalated. Airport police were called to the plane and the plane's captain was called upon to arbitrate. The captain apparently was persuaded by Leone's version of events and ordered Grimes off the plane. He refused to leave voluntarily, and was arrested by airport police for disorderly conduct. Handcuffed, Grimes was led off the plane by airport police. He claims he suffered injuries to his wrists, ankles, neck, right shoulder, and right arm as a result of his escort off of the plane. Mrs. Grimes claims emotional injuries.

II. DISCUSSION

A. The Summary Judgment Standard

Summary judgment is appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). An issue of fact is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material if it might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party is entitled to every favorable inference that can be drawn from the record. *Sharrar v. Felsing*, 128 F.3d 810, 817 (3d Cir.1997). The nonmovant, however, may not avoid summary judgment by relying on evidence that is merely colorable or not significantly probative, *Anderson*, 477 U.S. at 249-50, and similarly may not rely on mere allegations, general denials, or vague statements, *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir.), *cert. denied*, 502 U.S. 940, 112 S.Ct. 376, 116 L.Ed.2d 327 (1991). It is the movant's initial burden to identify portions of the record demonstrating what it believes is an absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the burden of proof at trial is the non-movant's, however, the movant can meet its obligation under Celotex by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. Summary judgment is appropriate if the non-movant is unable to rebut the movant's absence of evidence claim. *Id.* at 323.

B. The Warsaw Convention and Its Effect On Plaintiffs' Claims

Defendant believes it is entitled to summary judgment because Plaintiffs' claims are barred by the Warsaw Convention, which addresses airlines' liability for injuries occurring during international travel.[1] Specifically, Defendant argues *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999), confirms that the Warsaw Convention provides the exclusive cause of action for injuries suffered during international flights, and *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1990), prohibits Mrs. Grimes from recovering for her emotional injuries. With respect to Mr. Grimes, Defendant contends he was not injured as a result of an "accident" within the meaning of the Warsaw Convention, and even if an "accident" did occur, the record still supports summary judgment.

1. Plaintiffs' Claims Under Article 25 of the Warsaw Convention

Plaintiffs first argue the limitations the Supreme Court recently has visited on recovery under the Warsaw Convention all relate to Article 17, and have

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[1] The Grimes' trip qualifies as an international one even though their trip from Vancouver to Philadelphia was interrupted by a stay in Detroit. Convention for the Unification of Certain Rules Relating to International Transportation by Air [hereinafter "Warsaw Convention"], Oct. 12, 1929, art. 1(2), 49 Stat. 3000, T.S. No. 876 (1934), codified as amended at 49 U.S.C.A. § 40105 (1997).

never been explicitly extended to Article 25.[2] The Court, however, does not find Article 25 is applicable here. Plaintiffs have failed to adduce any evidence that any Northwest employee acted with intent to injure Plaintiffs or acted recklessly and with knowledge that damage to Plaintiffs would result. *See Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1290 (11th Cir.1999) (arriving at this standard after an exhaustive review of other circuits' and countries' treatment of "willful"); *see also Republic Nat'l Bank v. Eastern Airlines*, 815 F.2d 232, 238-39 (2d Cir.1987) (finding no genuine issue of material fact existed regarding willful misconduct); *Onyebuchim Onyeanusi v. Pan Am. World Airways, Inc.*, 767 F.Supp. 654, 657 (E.D.Pa.1990) (same). The Court therefore will proceed to analyze Plaintiffs' claims under Article 17.

Article 25 prevents air carriers from availing themselves of the Warsaw Convention's limitations on liability when the carrier or its employees injures a passenger through wilful misconduct.

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with

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[2] Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention art. 17.

> the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier within the scope of his employment.

Id. art. 25.

2. Plaintiffs' Claims Under Article 17 of the Warsaw Convention

a. Mrs. Grimes' Claims. Mrs. Grimes claims she suffered emotional injuries as a result of the incident on the plane. The Court agrees with Defendant that she cannot recover for these injuries. The Warsaw Convention unequivocally is the exclusive remedy for injuries suffered during the course of international air travel, *El Al Israel*, 119 S.Ct. at 667-68, and the Warsaw Convention does not permit recovery for purely mental or emotional injuries, *Floyd*, 499 U.S. at 552. Mrs. Grimes' claims are barred by the Warsaw Convention, and Defendant's motion is granted with respect to Mrs. Grimes' claims.

b. Mr. Grimes' Claims. Mr. Grimes claims he suffered a variety of physical injuries during his confrontation with Leone and his arrest by airport police. To determine whether Defendant is liable, the Court should consider where the accident occurred, the activity the injured person engaged in, and the control by the defendant of the injured person where and when the injury occurred. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir.1977). Before the Court engages in this analysis, however, it must find an

accident within the meaning of the Warsaw Convention occurred and, if so, that the accident happened while the passenger was on board the plane or while she was embarking or disembarking from the plane. Warsaw Convention art. 17.

An accident has occurred only "if a passenger's injury is caused by an unexpected or unusual event that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). The Court must apply this standard flexibly, considering all of the circumstances that surrounded the passenger's injuries. *Id.* The passenger is required to show only that one link in the chain of events leading to his injury was unexpected or unusual to prove an accident has occurred. *Id.* at 406. This one link, however, must relate to the cause of the incident, not merely to the occurrence itself. *Id.* at 399. Where the Court is confronted with contradictory evidence, it should defer to the jury whether an "accident" occurred. *Id.*

Plaintiffs claim Mr. Grimes was injured twice: first by Leone, during the disagreement over whether Grimes occupied the correct seat; and second by the airport police, when he was removed from the plane. Neither set of alleged injuries was caused by an "accident" under the Warsaw Convention. An argument over seating is neither unexpected nor unusual, particularly in view of Grimes' admissions that he refused to move to another seat, as Leone instructed, and that he responded to Leone's instructions with unfavorable comments regarding Leone's appearance.

Similarly, the injuries Grimes claims to have suffered when removed from the plane were not the result of an "accident." Whatever injuries he suffered occurred because he was arrested, and he was arrested

only because he refused to leave the plane voluntarily. He never would have been handcuffed and taken off the plane had he left when ordered by the plane's captain. It does not matter if it was the captain's decision that initiated the chain of events leading to his arrest; the fact remains it was entirely within Grimes' control whether he was arrested. (*See* C. Grimes Dep. at 71.) Grimes' decision interrupts the captain's causal connection to the alleged injuries. Moreover, this causal chain must extend beyond when the arrest took place. Under Saks the Court is required to look at the circumstances surrounding the incident, and Grimes' behavior and decisions plainly are among the factors the Court must consider. Grimes himself held the key as to whether he would be arrested. He declined to be compliant; he refused to leave voluntarily. Having precipitated this result, neither the Warsaw Convention nor equity permit him to recover from Defendant. The Court will enter summary judgment in favor of Defendant.

An Order follows.

ORDER AND NOW, this 30th day of July, 1999, upon consideration of Defendant Northwest Airlines, Incorporated's Motion for Summary Judgment (Document No. 21), Plaintiffs Charles L. Grimes and Jane Gillespie Grimes' response thereto, and Defendant's reply, it is hereby ORDERED:

1. Defendant's Motion for Summary Judgment is GRANTED;

2. Judgment is entered in favor of Defendant Northwest Airlines, Incorporated and against Plaintiffs Charles L. Grimes and Jane Gillespie Grimes; and

3. The Clerk of Court is ordered to mark this matter closed.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. CIV. A. 98-CV-4794

CHARLES L. GRIMES:
JANE GILLESPIE GRIMES,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

July 22, 1999

MEMORANDUM AND ORDER

JAMES McGIRR KELLY, JUDGE

Presently before the Court is Defendant Northwest Airlines, Incorporated's Motion *in Limine*. The Court recently granted this motion, but subsequently received Plaintiff's response. In view of Defendant's lack of objection to the Court's consideration of Plaintiff's response, the Court will vacate its earlier Order granting Defendant's motion. As the Court previewed in that Order, however, Defendant's position is well supported by the applicable law, and for that reason the Court will grant Defendant's motion.

Defendant moves to exclude certain damages testimony Plaintiffs propose to offer. Specifically, Plaintiffs allege the injuries Mr. Grimes suffered due to

Defendant's conduct left him unable to fly for a period of four months, during which time the opportunity to make investment decisions passed. As Plaintiffs see it, if Mr. Grimes had completed the flight on which he allegedly was injured, he would have been able to visit the facility of a company in which he already invested. He would have made critical observations, based on which he would have delayed purchasing preferred stock, and would have sold his common stock, later repurchasing it at a far lower price. These transactions, all frustrated by Defendant's actions, would have yielded Plaintiffs over $1.3 million.[1]

Defendant argues this testimony is far too speculative to be presented to a jury, and the Court agrees. Parties may not present speculative damages testimony to a jury, *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 265 (3d Cir.), *cert. denied*, 516 U.S. 915, 116 S.Ct. 303, 133 L.Ed.2d 208 (1995), but damages are not speculative merely because the amount cannot be determined with certainty. Rather, damages are speculative only if the uncertainty surrounding them relates to whether they actually exist. *Id.*; *see also Pashak v. Barish*, 303 Pa.Super. 559, 450 A.2d 67, 69 (Pa.Super.Ct.1982). The damages claimed here hardly could be more speculative; Plaintiffs' claim is no more grounded in factual reality than if they claimed Defendants delayed Mr. Grimes from visiting a coffee shop that sold a winning lottery ticket at approximately the same time he would have been there. Plaintiffs' theory rests entirely on the assumption that Mr. Grimes would have learned the critical information on his visit,

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[1] Plaintiffs fail to explain why Mr. Grimes was unable to avail himself of other investigatory means during this four month period.

but Plaintiffs point to nothing allowing even an inference that this discovery would have occurred. Plaintiffs' damages theory therefore is an untenable blend of supposition and hope, inappropriate for presentation to the jury. Defendant's motion is granted.

An Order follows.

ORDER AND NOW, this 22nd day of July, 1999, upon consideration of Defendant Northwest Airlines, Incorporated's Motion *in Limine* (Document No. 29), and Plaintiffs Charles and Jane Grimes' response thereto, it is hereby ORDERED:

1. The Court's Order of July 15, 1999, is VACATED; and

2. Defendant's Motion *in Limine* (Document No. 29) is GRANTED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 98-CV-4794

CHARLES L. GRIMES:
JANE GILLESPIE GRIMES,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

FILED MAR 23 1999
MICHAEL E. KUNZ, Clerk

ORDER

AND NOW, this 22nd day of March, 1999, upon consideration of U.S. Magistrate Judge Thomas J. Rueter's Report and Recommendation, Plaintiffs' objections thereto, and Defendant's response to Plaintiffs' objections, it is hereby **ORDERED**:

1. The Report and Recommendation is **APPROVED AND ADOPTED**; and

2. Count VII of Plaintiffs' Complaint is **DISMISSED**.

BY THE COURT:

/s/ James McGirr Kelly

ENTERED: 3/23/99

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 98-4794

CHARLES L. GRIMES:
JANE GILLESPIE GRIMES,

Plaintiffs,

v.

NORTHWEST AIRLINES, INC.,

Defendant.

FILED JAN 19 1999

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge January 19, 1999

Plaintiffs Charles L. Grimes and Jane Gillespie Grimes ("Plaintiffs"), served a complaint (Doc. No.98-4794) upon Defendant, Northwest Airlines, Inc. ("Defendant"), alleging injuries from a dispute over seating assignment on Northwest's airplane. Plaintiffs seek compensatory and punitive damages. Northwest has brought this present Motion for Judgment on the Pleadings to dismiss Count VII of Plaintiff's complaint for punitive damages, alleging that punitive damages are not recoverable under the Warsaw Convention. For the following reasons, the court recommends that Defendant's motion be GRANTED.

I. STANDARD OF REVIEW

Defendant seeks judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Because Defendant's motion does not seek to determine the substantive merits of the case, this court will treat the 12(c) motion as a 12(b)(6) motion to dismiss for failure to state a claim. *Rodgers v. Atwork Corp.*, 863 F. Supp. 242, 244 (E.D. Pa. 1994); A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1369 at 532-33 (1990). On review of a motion to dismiss for failure to state a claim, all allegations in the complaint must be accepted as true, and the plaintiff must be given the benefit of every favorable inference to be drawn therefrom. *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992) (citations omitted).

II. BACKGROUND

Plaintiffs allege injuries arising out of a seating dispute on an international Northwest Airlines flight. Based on the facts alleged in the complaint, defendant's employee physically harmed plaintiff Charles Grimes. Then, defendant's employee, with the assistance of another employee, summoned the airport police to arrest Mr. Grimes. Mr. Grimes further claims he was physically injured in the process of his arrest and removal from the aircraft.

In Count VII of the complaint, plaintiffs seek punitive damages based on defendant's wilful misconduct. Defendant brings this motion before the court asserting that plaintiffs' injuries are governed by the Warsaw

Convention[1] which prohibits recovery of punitive damages.

DISCUSSION

The Warsaw Convention limits an airline's liability for passengers' accidents on the aircraft or on embarking or disembarking from the plane. *Brown v. U.S. Airways, Inc.*, 1998 WL 634901 at *1 (E.D. Pa. Sept. 16, 1998). The Supreme Court of the United States has recently determined that "recovery for a personal injury suffered 'on board [an] aircraft or in course of any of the operations of embarking or disembarking,' if not allowed under the Convention, is not available at all." *El Al Israel Airlines. Ltd. v. Tsui Yuan Tseng*, 1999 WL 7724 at *4 (Jan. 12, 1999). To recover under the Warsaw Convention, a passenger must have been physically injured as a result of an accident. *Id.* A passenger whose injury is not compensable under the Convention, that is the injury "entails no 'bodily injury' or was not the result of an 'accident,'" will have no recourse to an alternate remedy under local law. *Id.*

The Supreme Court has ruled that liability under Article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. *Air France v. Saks*, 470 U.S. 392, 405 (1985). The Supreme Court stated that this definition "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* (citations omitted). The Supreme Court noted that the lower courts have interpreted Article 17 broadly enough to encompass accidents such as torts committed by terrorists and fellow passengers. *Id.* (citations omitted). However,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. no. 876 (1934), codified as amended at U.S.C. § 40105 (1998).

where there is evidence to the contrary, the Supreme Court held that the trier of fact must decide whether an "accident" caused the passenger's injuries. *Saks*,, 470 U.S. at 405.

The Third Circuit Court of Appeals defines "accident" within the meaning of Article 17 to be:

> [A]n event, a physical circumstance, which unexpectedly takes place not occurring to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual, or unexpected, an unusual or unexpected happening.

Abramson v. Jaoan Airlines Co.. Ltd., 739 F.2d 130, 132 (3d Cir. 1984) (quoting *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1196 (3d Cir. 1978). In *Abramson*, the plaintiff claimed the defendant airline exacerbated his pre-existing hiatal hernia by preventing him from lying down in unoccupied first-class seats. *Id.* at 131. The Third Circuit held that defendant's actions were not an "accident" under Article 17 of the Warsaw Convention because the injury did not arise from an "unusual or unexpected happening within the definition of *DeMarines*." *Id.* at 133. The Court reasoned, "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17. *Id.*

However, a determination of whether plaintiffs' injuries were the result of an accident is not necessary to the disposition of the present motion. Recovery for personal injuries is exclusively limited to the remedies

provided in the Warsaw Convention. Tseng, 1999 WL 7724, at *4. It is well-settled that punitive damages are not recoverable under Article 17 of the Warsaw Convention. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1487 (D.C. Cir.), *cert. denied* 502 U.S. 994 (1991); *In re Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1288 (2d Cir.), *cert. denied* 502 U.S. 920 (1991); *Brown*, 1998 WL 634901, at *1; *Zarolli v. U.S.. Airways, Inc.*, 1998 WL 195697, at *2 (E.D. Pa. Mar., 24, 1998). Additionally, punitive damages are not recoverable under Article 25 of the Convention (pertaining to wilful misconduct of the airline). *Korean Air Lines Disaster*, 932 F.2d at 1488-89. Therefore, plaintiffs cannot recover for punitive damages. Accordingly, the court makes the following

RECOMMENDATION

AND NOW, this 19th day of January, 1999, it is hereby respectfully recommended that Defendant's Motion for Judgment on the Pleadings, treated as a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim, be GRANTED, and Count VII of the complaint requesting punitive damages be DISMISSED.

BY THE COURT:

/s/ Thomas J. Rueter
THOMAS J. RUETER

ENTERED: 1/20/99

APPENDIX G

WARSAW CONVENTION

49 Stat. 3000; TS 876
CONVENTION FOR THE UNIFICATION
OF CERTAIN RULES RELATING TO
INTERNATIONAL TRANSPORTATION BY AIR

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE–DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I. PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III. AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not

have the effect of depriving the transportation of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be prima facie evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by

requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any

checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own

law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the

contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down

by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this

convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

APPENDIX H

Article IX of Montreal Protocol No. 4 To Amend the Convention for the Unification of Certain Rules Relating to International carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague of 28 September 1955, Signed at Montreal on 25 September 1975

Article IX

Article 25 of the Convention shall be deleted and replaced by the following:

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Supreme Court, U.S.
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(2)

No. 00-211

In The

Supreme Court of the United States

CHARLES L. GRIMES and
JANE GILLESPIE GRIMES, h/w,

Petitioners,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF NORTHWEST AIRLINES, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

Numerous Northwest Airlines, Inc. (Northwest) personnel attempted to discuss with Petitioner Charles L. Grimes (Petitioner) the fact that he was sitting in the wrong seat on Northwest Flight 0342. He had just taken a flight from Vancouver, British Columbia to Detroit and was scheduled to continue his journey from Detroit to Philadelphia. For the safety of other passengers that could be harmed and to permit Petitioner to discuss the matter in private, the flight crew repeatedly asked Petitioner to step into the jetway. Petitioner steadfastly refused, becoming increasingly verbally abusive, insulting a flight attendant and announcing that airport police would have to arrest him to get him off the plane. Thereafter, airport police removed Petitioner from the plane.

The questions presented are as follows:

1. Whether the court below properly held that Petitioner did not suffer an "accident which caused the damage" within the meaning of Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929 (the Warsaw Convention), 49 Stat. 3000 (1934), T.S. No. 876 (1934), codified as amended at 49 U.S.C.A. § 40105?

2. Whether the limitation of liability provision in Article 25 creates a separate cause of action for "wilful misconduct" even where there is no "accident?"

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent Northwest Airlines, Inc. makes the following disclosure:

1) Respondent, a nongovernmental corporation, has the following parent corporations:

Respondent is a wholly owned subsidiary of Northwest Airlines Corp.

2) The following all publicly held companies hold 10% or more of Respondent's stock:

Alliance Capital.

TABLE OF CONTENTS

Page

STATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

TREATIES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR DENYING CERTIORARI 5

REASONS FOR DENYING CERTIORARI 7

I. This Court Should Not Grant Certiorari On The Question Of Whether There Was An "Accident" Within The Meaning of Article 17 7

(1) The Question Is Not An Unsettled "Important Question Of Federal Law." 7

(2) Contrary To Petitioners' Assertions, The Decision Of The Court Below Is Not In Conflict With Decisions Of This Court Or Of The Eleventh Circuit 8

TABLE OF CONTENTS – Continued

Page

II. This Court Should Deny Certiorari On The Question Of Whether Article 25 Creates An Independent Cause Of Action For Mere "Wilful Misconduct" Absent "An Accident Which Caused The Damage So Sustained." 11

(1) The Question Is Not An Unsettled "Important Question Of Federal Law." 11

(2) Contrary To Petitioners' Assertions, The Decision Below Is Consistent With This Court's Interpretation Of The Treaty And That Of Other Courts Of Appeals 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

In re Air France v. Saks, 470 U.S. 392 (1985) ..5, 6, 8, 10

Asher v. United Airlines, 70 F. Supp.2d 614 (D. Md. 1999) 6, 14, 15

Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989) (holding wilful misconduct only removes liability cap in Article 22 and does not make Warsaw Convention inapplicable as a whole), *rev'd on other grounds*, 499 U.S. 530 (1991) 15

El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) 5, 6, 8, 9, 14, 15

In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir. 1991) 15

Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998) 5, 6, 8, 10

Langadinos v. American Airlines, Inc., 199 F.3d 68 (1st Cir. 2000) 9

Oliver v. Scandinavian Airlines Sys., 17 CCH AV. Cas. 18,283 (Md. 1983) 10

Stone v. Mexicana Airlines, Inc., 610 F.2d 699 (10th Cir. 1979) 15

Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000) 10

STATUTES, RULES AND OTHER AUTHORITIES

28 U.S.C. § 1331 ..... 2, 4

28 U.S.C. § 1332 2

SUP. CT. R. 10 ..... 5, 7, 8, 10, 11

TABLE OF AUTHORITIES – Continued

Page

SUP. CT. R. 29.6 iii

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876 (1934), codified as amended at 49 U.S.C.A. § 40105 2

Article 17 of the Warsaw Convention 4, 5, 9, 13, 14

Article 20 of the Warsaw Convention 13, 14

Article 21 of the Warsaw Convention 13

Article 22 of the Warsaw Convention 13, 14, 15

Article 23 of the Warsaw Convention 14

Article 25 of the Warsaw Convention ..6, 11, 12, 13, 14

Article 25(1) of the Warsaw Convention.....11, 14, 15

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit is not reported but is reproduced in Petitioner's Appendix (Pet. A-) at 1a and 6a, respectively. The Opinion of the United States District Court for the Eastern District of Pennsylvania (the district court) from which this appeal arose is reported at 1999 WL 562244 (E.D.Pa.) and is reproduced at Pet. A-8a.

While Petitioners have also reproduced the unreported Opinion and Order of the district court granting Northwest's Motion in Limine, Order of the district court adopting Magistrate Judge's Report and Recommendation and Report and Recommendation of Magistrate Judge on Punitive Damages, those Opinions and Orders are not relevant to this appeal. *See* Pet. A-16a; Pet. A-19a; Pet. A-20a.[1]

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[1] The Opinion and Order of the district court granting Northwest's Motion in Limine precluded Petitioners from presenting speculative evidence that Northwest caused them to suffer losses as a result of Petitioner's alleged inability to fly for four months. *See* Opinion and Order of the district court granting Northwest's Motion in Limine reported at 1999 WL 527831 (E.D.Pa.) and reproduced at Pet. A-16a.

The Order of the district court adopting Magistrate Judge's Report and Recommendation and the Report and Recommendation of Magistrate Judge on Punitive Damages concerned Northwest's Motion for Judgment on the Pleadings to dismiss Count VII of Petitioners' Complaint in which Petitioners requested punitive damages. *See* Pet. A-19a-20a. None of these Opinions and Orders are relevant here.

JURISDICTION

Northwest does not dispute the basis of appellate jurisdiction. However, Northwest disputes the basis of jurisdiction of the district court for the underlying action. Petitioners claim that the district court had jurisdiction pursuant to both 28 U.S.C. § 1332 based upon the diversity of the parties and an amount in controversy exceeding $75,000.00. Petitioners also claim that federal court jurisdiction exists pursuant to 28 U.S.C. § 1331, providing for jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." Pet. at 3. Northwest disputes Petitioners' contention this case involves an amount in controversy exceeding $75,000.00. The district court's jurisdiction should be based solely upon 28 U.S.C. § 1331.

TREATIES INVOLVED

This case involves the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929 (the Warsaw Convention), 49 Stat. 3000 (1934), T.S. No. 876 (1934), codified as amended at 49 U.S.C.A. § 40105. *See* Pet. A-25a.

STATEMENT OF THE CASE

The claims of Petitioners Charles L. Grimes (Petitioner) and Jane Gillespie Grimes (together Petitioners) stem from an incident that allegedly took place at Detroit Metropolitan Airport on August 13, 1998 on board a

Northwest Airlines, Inc. (Northwest) aircraft. Petitioner had flown from Vancouver, British Columbia to Detroit and was scheduled to complete his journey on Flight 0342, from Detroit to Philadelphia.

Upon boarding the flight in Detroit, Petitioner took a seat in the exit row which was not assigned to him. Northwest's flight crew tried to discuss this fact with him and resolve his seating assignment. First the gate agent, Mark Leone, then the head of customer service and finally the captain asked him to step into the jetway to resolve the matter. (The flight crew wished to separate him from other passengers who could be harmed if he became violent. They also felt that the jetway presented a place where Petitioner could speak in a dignified manner without being watched by other passengers.)

Petitioner refused. He became visibly angry and began to shake, calling Mr. Leone "a psychotic deformed dwarf" and announcing that airport police would have to arrest him to get him off the plane.

Thereafter, airport police officers removed him from the aircraft. Petitioner had become a safety risk:

> A: * * *
>
> "Somebody that's being belligerent on the ground at the gate, in the event of some emergency in the air, why should we expect them to be any less belligerent in following instructions on in the air; so, with that, it became a safety of flight item, and I went back to assess the situation and when Mr. Grimes refused to step out on the jet way and talk reasonably about the situation, is when I made my decision that he would be off the airplane primarily for safety."

(Deposition of the captain, James L. Rosser, Feb. 17, 1999, at p. 42). Petitioner said that he was not injured in the incident in which the police merely handcuffed him, removed him from the plane and released him within a half hour.

Petitioners filed suit against Northwest by way of a seven count Complaint in the United States District Court for the Eastern District of Pennsylvania. Petitioners' Complaint stated claims against Northwest for false arrest and imprisonment, assault and battery, intentional infliction of emotional distress, defamation and negligence and contained a request for punitive damages. Because this action is governed by the Warsaw Convention, the district court had jurisdiction of the case pursuant to 28 U.S.C. § 1331 providing for federal question jurisdiction.

Petitioner challenges the entry of summary judgment in Northwest's favor. Northwest moved for summary judgment because Petitioner's claimed injuries did not result from an "accident" within the meaning of Article 17 of the Warsaw Convention. The district court granted the motion. Pet. A-8a-15a.[2]

The United States Court of Appeals for the Third Circuit affirmed. The court held that Petitioner had not suffered injuries as a result of an "accident" within the meaning of Article 17. Pet. A-1a-5a. The court further held that the limitation of liability provision in Article 25 of the Warsaw Convention does not create a cause of action for "wilful misconduct" where a plaintiff has not

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[2] The court also granted Northwest's motion for summary judgment as to the claims of Jane Gillespie Grimes (the Petitioner-wife), *see* Pet. A-8a-15a, which Petitioners do not challenge.

established the elements of a cause of action for an "accident" under Article 17. *Id.* at 4a, n. 3.

SUMMARY OF REASONS FOR DENYING CERTIORARI

Certiorari is granted only for compelling reasons. This Court should deny Petitioners' writ of certiorari in this case because there is no compelling reason to grant it. Petitioners claim that the Third Circuit's holding that there was no "accident" under Article 17 is important because the Warsaw Convention applies to millions of travelers who fly to and from the United States. The fact that the treaty applies to large numbers of people is indisputable. However, that does not establish that the question whether there was an "accident" involves an unsettled important question in this case. Otherwise, *any* issue involving the Warsaw Convention, or international air travel in general, regardless of prior judicial rulings, would be important in *any* case it arose.

Not only do Petitioners fail to show that this holding is "important" and unsettled; they fail to establish that the decision is inconsistent with relevant decisions of this Court and with decisions of other United States courts of appeals on the same matter. *See* SUP. CT. R. 10. The Third Circuit's decision is perfectly consistent with the cases with which Petitioners claim it conflicts, *In re Air France v. Saks*, 470 U.S. 392, 405 (1985), *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). Petitioners advance, in favor of an

inconsistency, disputed facts which have no bearing on the legal question presented. There is no split of authority and therefore no compelling reason to grant certiorari.

Certiorari should also be denied on the second question Petitioners seek to present, whether Article 25 creates an independent cause of action. Petitioners fail to establish that there is any unresolved or conflicting issue of sufficient import to warrant this Court's review. *Air France, El Al, Krys, supra,* and *Asher v. United Airlines,* 70 F. Supp.2d 614 (D. Md. 1999) are all consistent with each other as well as with this case. There must be an "accident which caused the damage so sustained." So states the settled, consistent prior rulings of our courts.

Petitioners argue that certiorari should be granted because the decision rests upon a "principle" of treaty construction Petitioners claim this Court condemns. *See* Pet. at 12. Petitioners cite no authority showing that certiorari is appropriate in such a case. However, contrary to Petitioners' assertions, the decision below is not in conflict with any principle of proper treaty construction. The court's interpretation of the treaty is consistent with its plain language, this Court's construction of its provisions, *Asher, supra,* and the authority of the other federal courts the *Asher* decision collects. Certiorari should therefore be denied.

REASONS FOR DENYING CERTIORARI

I. This Court Should Not Grant Certiorari On The Question Of Whether There Was An "Accident" Within The Meaning of Article 17.

(1) The Question Is Not An Unsettled "Important Question Of Federal Law."

This Court should deny certiorari. Rule 10 of the Rules of the Supreme Court of the United States provides that a writ of certiorari should be granted only for compelling reasons:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> (b) [matters related to a state court decision];
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

> conflicts with relevant decisions of this Court.

SUP. CT. R. 10. There is no compelling reason to grant this petition. Northwest does not dispute Petitioners' statement that millions of passengers travel by air internationally. However, it does not follow that therefore the question of whether there was an "accident" in this case involves an unsettled important question. If it did, *any* issue involving the Warsaw Convention, and indeed any issue involving international travel, would be important in *any* case, regardless of prior decisions. Petitioners must demonstrate why in this case, involving a passenger who refused to vacate his seat, this Court needs to settle the question.

(2) Contrary To Petitioners' Assertions, The Decision Below Is Not In Conflict With Decisions Of This Court Or Of The Eleventh Circuit.

Petitioners not only failed to establish the importance of the question whether there was an "accident;" Petitioners' argument that the decision below is inconsistent with this Court and other courts of appeals' decisions on "the same . . . matter" also fails. *See* SUP. CT. R. 10.

Petitioners claim that the Third Circuit's decision conflicts with *In re Air France v. Saks*, 470 U.S. 392, 405 (1985), *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). They are simply incorrect.

In *Saks*, this Court defined the term "accident" in Article 17 of the Warsaw Convention as "an unexpected

or unusual event or happening that is external to the passenger." *Id.*, 470 U.S. at 405. The Third Circuit applied that definition and held that there was no "accident." That holding does not conflict with *Saks*. Although Petitioner is obviously unhappy with the decision, the application of fact to law does not create a legal question. There, quite simply, is no split of authority requiring action by this Court. This case therefore does not warrant certiorari.

Petitioners next claim that the Third Circuit's decision is inconsistent with dictum in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999). In *El Al*, this Court held that "recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' Art. 17, 49 Stat. 3018, if not allowed under the Convention, is not available at all." *Id.*, 525 U.S. at 161.

In this case, the Third Circuit held that there was no "accident" under Article 17 and thus, no action. Nothing in the Third Circuit's holding conflicts with *El Al*.

Petitioners argue that there is a conflict because in *El Al* this Court questioned whether, under the facts of that case, an "accident" occurred. Petitioners' argument again fails because it depends on a factual analysis of the cases, not the definition of "accident." Petitioners present no unsettled legal question so certiorari is not warranted.

It is true, as Petitioners note, that where flight personnel serve a passenger alcohol and he becomes drunk, injuries he causes another passenger will fall within the *Saks* definition of "accident." *See Langadinos v. American*

Airlines, Inc., 199 F.3d 68 (1st Cir. 2000); *Oliver v. Scandinavian Airlines Sys.*, 17 CCH AV. Cas. 18,283 (Md. 1983). However, those cases present distinguishable facts, not a conflicting legal ruling. Moreover, those cases are not on "the same . . . matter" as this case. *See* SUP. Ct. R. 10. Petitioner does not claim that a drunken passenger, or any other passenger, caused his injuries.

Petitioners claim that the Third Circuit's approach is inconsistent with *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). In *Krys*, the Eleventh Circuit reasoned that the continuation of a flight to its destination is not an "unusual or unexpected event . . . external to the plaintiff." The court therefore held that the plaintiff's injuries, which were suffered thereby,[3] were not the result of an "accident." *Id.* at 1522.

In the case at bar, the Third Circuit likewise found that a passenger's refusal to follow crew member instructions, and to demand his own arrest, do not amount to an "unexpected or unusual event . . . external to the passenger." Nothing in *Krys* conflicts with the Third Circuit's decision in this matter.

Finally, Petitioners claim that *Wallace v. Korean Air*, 214 F.3d 293 (2d Cir. 2000) is conflicting. In *Wallace*, the plaintiff claimed that she was sexually groped by another passenger. *See id.* The Second Circuit decided that she suffered her injuries for reasons external to her actions and, therefore, in an "accident." In reaching this decision, the Second Circuit applied the same *Air France* analysis

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[3] Plaintiff suffered a heart attack.

used by the Third Circuit. These holdings are not in conflict. *See* SUP. CT. R. 10. This Court should decline to grant certiorari on the question of whether there was an "accident."

II. This Court Should Deny Certiorari On The Question Of Whether Article 25 Creates An Independent Cause Of Action For Mere "Wilful Misconduct" Absent "An Accident Which Caused The Damage So Sustained."

(1) The Question Is Not An Unsettled "Important Question Of Federal Law."

Certiorari should be denied on the question whether Article 25 creates an independent cause of action. Petitioners failed to establish that the matter is an unsettled "important question of federal law." Petitioners made the same argument for its importance they did on the question of whether there was an "accident;" they based their argument on the fact millions of people fly internationally. That does not satisfy the standard of review. "Importance" is not enough. It must also be a question "that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). Article 25 does not speak of "wilful misconduct" in the abstract. By its plain terms, the article refers to "the damage" that is "caused by" the carrier's "wilful misconduct:"

> **Article 25**
>
> (1) The carrier shall not be entitled to avail himself of the provisions of this convention

> which exclude or limit his liability, if the damage is caused by his wilful misconduct. . . .

Article 25, Pet. A-36a. "Wilful misconduct" that does not cause "the damage" does not give rise to a cause of action. Petitioners cite no authority to the contrary.

(2) Contrary To Petitioners' Assertions, The Decision Below Is Consistent With This Court's Interpretation Of The Treaty And That Of Other Courts Of Appeals.

Certiorari should also be denied because Petitioners' do not argue that there is a compelling reason to grant it. Petitioners do not claim that the Third Circuit decision is in conflict with that of this Court or another federal appellate court. Rather, Petitioners argue that this Court should grant certiorari because the decision rests upon a "principle" of treaty construction this Court allegedly condemns. *See* Pet. at 12. Petitioners cite no authority establishing that certiorari is appropriate in such a case. Certiorari should therefore be denied.

Moreover, the Third Circuit's decision does not, in fact, run contrary to any principle of proper treaty construction. Petitioners assume that because the Third Circuit held that Article 25 does not apply absent "an accident," the Third Circuit would preclude an action for "wilful misconduct" causing an injury. That is not the case. The Third Circuit's holding precludes a recovery for "wilful misconduct" without an "accident." *See* Third Circuit Opinion, Pet. A-4a ("To recover under the Convention one must always establish the elements *of a cause*

of action under Article 17.") (citations omitted and emphasis supplied).

This reading of the treaty is consistent with its plain language and this Court's construction of the document. Under this interpretation, Article 17 sets forth the elements of a cause of action under the treaty. It provides that there must be "damage sustained in the event of . . . bodily injury suffered by the passenger," and an "accident which caused the damage so sustained." Article 17, Pet. A-33a. Where those elements are present, a carrier is liable for the damage. *Id.*

Articles 20, 21 and 22 of the treaty exclude or limit that liability. Article 20, for instance, excludes the carrier from liability "if he proves that he and his agents have taken all necessary measures to avoid the damage. . . . " Article 20, Pet. A-34a. Article 21 limits or excludes liability, authorizing the court to "exonerate the carrier wholly or partly" if he can prove that the damage was caused or contributed to by the injured person's negligence. Article 21, Pet. A-34a. Article 22 limits the carrier's liability to specific monetary amounts. Article 22, Pet. A-35a.

Article 25 fits within this scheme. It precludes a carrier from limiting or excluding its liability where the carrier's "wilful misconduct" causes "the damage." *See* Article 25, Pet. A-36a. "[T]he damage" it refers to is that required by Article 17, "the damage sustained in the event of . . . bodily injury." Thus, after a plaintiff establishes a cause of action under Article 17, a carrier may limit or exclude its liability under Articles 20 through 22 unless the carrier's "wilful misconduct" caused "the

damage." In that event, Article 25 prohibits the carrier from doing so.

This interpretation of the treaty flows from this Court's decision in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) and the great weight of authority from other federal courts summarized in this action's mirror image, *Asher v. United Airlines*, 70 F. Supp.2d 614 (D. Md. 1999).

While not passing on the issue, in *El Al* this Court conducted nearly an identical analysis on the subject:

> . . . the Convention describes and defines the three areas of air carrier liability [which include] (personal injuries in Article 17. . . .), the conditions exempting air carriers from liability (Article 20), the monetary limits of liability (Article 22) ***and the circumstances in which air carriers may not limit liability (Articles 23 and 25).***

Id. at 169 (emphasis supplied). If this was not sufficiently clear, the Court noted:

> Chapter III of the Convention sets forth a number of other rules governing air carrier liability. Among these, Article 20 relieves a carrier of liability if it has "taken all necessary measures to avoid the damage." Article 22 sets monetary limits on a carrier's liability for harm to passengers and baggage. Article 23 invalidates "[a]ny [contract] provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the [C]onvention." ***Article 25(1) renders the Convention's limits on liability inapplicable if the damage is caused by a carrier's "wilful misconduct."***

El Al, 525 U.S. at 163, n. 7 (citations omitted and emphasis supplied).

Asher, supra, and the great weight of authority from other federal courts cited in the decision, further supports this. As the *Asher* court noted:

> While there is no published Fourth Circuit decision on point, the overwhelming weight of judicial authority holds that Article 25(1) [containing the 'wilful conduct' provision] merely lifts the monetary limitation liabilities of Article 22 of the Convention; it does not create an independent grounds [sic] by which to state tort claims that would not survive under the Convention. *See . . . Stone v. Mexicana Airlines, Inc.*, 610 F.2d 699, 700 (10th Cir. 1979) (holding wilful misconduct did not exclude Warsaw Convention's statute of limitations period); *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1483-85 (11th Cir. 1989) (holding wilful misconduct only removes liability cap in Article 22 and does not make Warsaw Convention inapplicable as a whole), *rev'd on other grounds*, 499 U.S. 530 . . . (1991); *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1488-89 (D.C. Cir. 1991) (holding Article 17 is not interpreted as one of the provisions that "exclude or limit" liability for which Article 25 applies.)

Asher, supra, 70 F.Supp.2d at 620.

There is no compelling reason to grant certiorari. The Third Circuit did not utilize a principle of treaty construction this Court has condemned. The Third Circuit interpreted the treaty in a manner that follows this Court's

interpretation and the great weight of authority from other federal courts.

CONCLUSION

For the foregoing reasons, Respondent Northwest Airlines, Inc. respectfully requests this Court to deny certiorari.

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Date: August 22, 2000

(3)

No. 00-211

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CHARLES L. GRIMES and JANE GILLESPIE GRIMES,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Correction of an Erroneous Representation of Fact in Respondent's Brief.

At the outset, we are constrained to correct certain categorically incorrect statements in respondent's brief.

Respondent says that petitioner Grimes "was sitting in the wrong seat," Brief for Respondent ("Resp. Br."), "Questions Presented," p. i; that he "took a seat in the exit row which was not assigned to him." *Id.* at 3.

Respondent cites no record source for these statements and they are not true. The record is clear that Grimes was sitting in the seat for which he held a valid and confirmed ticket and boarding pass. Leone himself testified that Grimes had been assigned that seat, that he held that boarding pass when he took the

seat, and that he had no way of knowing otherwise before Leone confronted him on the plane after he had taken the seat for which he held a boarding pass. APP1428-1431, APP1434. The boarding pass itself is in the record below at APP0137-38. Respondent, through incompetence or callous indifference, may well have subsequently given another passenger a boarding pass marked for the same seat as well, without informing Grimes, but there is no question but that Grimes was sitting in the seat assigned to him and which he had made special efforts to obtain.

Presumably this erroneous representation of the facts is thought to support respondent's otherwise puzzling characterization of *Asher* v. *United Airlines*, 70 F. Supp. 2d 614 (D. Md. 1999) (passenger sitting in business class with only a coach class ticket) as a "mirror image" of this case. Resp. Br. at 14.[1]

II. Respondent's Brief Is Directed at Issues That Are Not Presented.

1. The Petition makes two points. The first is that the *method* of analysis applied to the facts by the court below in purported compliance with *Air France* v. *Saks*,

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[1] Nor is any record citation offered for the proposition that Grimes referred to the over-200-pound Leone as a "dwarf," *id.* at 3, or the repeated innuendo that Grimes, whose behavior the very arresting officer described as "matter of fact," Petition at 5, presented some sort of risk of violence.

Such erroneous representations of fact have no bearing on the issue here, of course, except to point up the inappropriateness of summary judgment and the need to underscore this Court's admonition in *Air France* v. *Saks*, 470 U.S. 392, 405 (1985), that in Warsaw Convention cases "it is for the *trier of fact* to determine whether an 'accident' as here defined caused the passenger's injuries." (Emphasis added).

470 U.S. 392 (1985) — a loose sweeping *ipse dixit* that the broad class of event in issue is something "hardly unexpected or unusual" — is inconsistent with the Eleventh Circuit's interpretation in *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1521-22 and n.10 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998), that *Saks* requires specific analysis of the facts, "asking what precise event or events allegedly caused the damage sustained by the plaintiff"[2]; and with the characterization of the very approach followed by the court below as "questionable" by Justice Ginsburg, speaking for the Court, in *El Al Israel Airlines, Ltd.* v. *Tseng*, 119 S. Ct. 662, 670 n.9 (1999).

Respondent asserts, however, that petitioners' "argument depends on a factual analysis of the cases." Resp. Br. at 9. Not in the least. It addresses rather what *manner* of factual analysis a court should conduct — a question of law if there ever was one. And on this, the "questionable" methodology adopted by the court below stands in stark contrast to the careful methodology of other circuits, and warrants review by this Court.

2. Respondent's argument on the Petition's second point is directed at an issue that is simply not raised. Respondent incorrectly characterizes the question at issue as being whether Article 25 of the Warsaw Convention "creates a separate cause of action" for willful misconduct. Resp. Br. "Questions Presented," at i; *id.* at 11. Not so. The question is not whether Article 25 *creates* a separate cause of action, but whether it *negates the exclusion* of the cause of action *already*

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[2] *Accord*, *Wallace* v. *Korean Air*, 2000 WL 730385 (2d Cir. June 6, 2000).

created by domestic law, which would take place under Article 17 absent willful misconduct. This was the point succinctly made by Justice Stevens (dissenting as to a different question) in *El Al, supra*: Under Article 25, he pointed out, "[t]he Convention . . . does not preempt local law in cases arising out of 'willful misconduct,'" 119 S. Ct. at 676; "accident cases . . . preempt local law, [while] willful cases . . . do not." *Id.* at 677. As was pointed out in the Petition, the interpretation adopted by the court below flies in the face of the unambiguous words of the Convention and is justified only by a recourse to negotiating history that is impermissible under this Court's decisions. Petition at 13-14. Respondent's argument is directed at an irrelevant straw man.

Respectfully submitted,

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